

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**



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**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

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UNITED STATES OF AMERICA,

*Appellee,*

*against*

JOHN R. MARTIN, ROBERT J. RUTKOWSKI and THEIL  
TECHNICAL SERVICES, INCORPORATED,

*Defendants-Appellants.*

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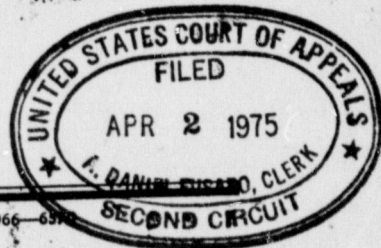
ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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**BRIEF OF APPELLANTS JOHN R. MARTIN AND  
THEIL TECHNICAL SERVICES, INC.**

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**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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Docket No. T4192

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**BRIEF OF APPELLANTS JOHN R. MARTIN AND  
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**Statement of Issues**

The sole issue submitted by defendants-appellants for review by this forum is:

1.) Whether the government's proof as to one of the essential elements of the crimes charged was sufficient to sustain a conviction, and, therefore, whether the Court below erred in denying the defendants' motion for a judgment of acquittal.

**Statement of the Case**

This is an appeal from judgments of conviction entered on December 9, 1974 in the United States District Court for the Eastern District of New York after a trial con-

ducted before the Hon. Jack B. Weinstein, District Judge, and a jury. The defendants-appellants stand convicted under indictments 74 CR 588 and 74 CR 717 of two counts of violation of Title 18, United States Code, Section 371 (conspiracy), and five counts of violation of Title 41, United States Code, Sections 51 and 54 (prohibited payments by sub-contractors on negotiated contracts).

### Facts

The within cause is one of many arising out of a large investigation and series of indictments regarding the payment of gratuities or kickbacks by numerous sub-contractors to numerous employees of the Grumman Aerospace Corporation allegedly in violation of Title 41, United States Code, Sections 51 and 54.

Section 51 (Section 54 merely adds the criminal sanction), as it applies to this case, prohibits payments by a sub-contractor, as an inducement or acknowledgment for the award of a sub-contract or order, to any employee or agent of a prime contractor holding a negotiated contract entered into by any department, agency or establishment of the United States. Section 52 of Title 41 defines "negotiated contract" as one "made without formal advertising".

The evidence presented in the Court below bearing on the issue or element of whether the prime contracts were "negotiated contracts" is as follows:<sup>1</sup>

A.) Howard Dunn, Director of Corporate Audits for the Grumman Corporation (the parent corporation of Grumman Aerospace), and the first government witness, testified that various purchase orders for techni-

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<sup>1</sup> The actual payment of the sums was never in issue in the trial below (the individual defendants confirmed them in their testimony), but rather the atmosphere of economic coercion that elicited such payments.

cal manuals awarded to the defendant corporation represented sub-contracts under certain "prime contracts" (the term chosen by the prosecuting authority) which he identified by number from the government exhibits (trial minutes pages 65-77).

Mr. Dunn stated on direct examination that the "prime" contracts were negotiated with the government (trial minutes pages 56-58) and that they were made without formal advertising (trial minutes pages 58, 65, 69, 74, 76, 77), but on cross-examination he indicated that he never had anything to do with negotiating or obtaining the contracts he referred to on direct examination, and that he didn't know of his own personal knowledge if the contracts were negotiated (trial minutes pages 91-93).

On re-direct examination Mr. Dunn stated that it was his belief that these contracts were not formally advertised because of the "magnitude" of the dollar amounts<sup>2</sup> and his fifteen years experience; but that this was only a belief and he could not say definitely (trial minutes pages 129-130).

B.) Subsequently a stipulation was entered between the prosecution and defense that "under item 13 on the face" of the contracts referred to by Mr. Dunn, between Grumman and the Navy were boxes to be checked indicating procurement by either advertising or negotiation and that the negotiation box was checked in each instance. It was additionally stipulated that further boxes appeared under negotiation to indicate statutory authority for negotiation and that certain of those boxes were also checked. The Court took judicial notice of the statutes mentioned and they were read to the jury (trial minutes pages 439-443).

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<sup>2</sup> Such a basis for belief is interesting in view of the many statutes mandating formal advertising for all contracts *over* a stated amount, and making negotiation the exception.

The question of proof of the element of whether or not such prime contracts were negotiated produced colloquies at the sidebar outside the hearing of the jury (trial minutes pages 474-475, 573-580). The Court addressed itself in particular to the sufficiency of the stipulation in view of the limitations placed thereon (trial minutes page 574) and the fact that Mr. Dunn's testimony could not amplify the proof (trial minutes page 576) thereby requiring additional proof to establish the element of negotiation (trial minutes pages 577-578).

C.) Government's exhibit 34—copies of various "determinations and findings" purportedly pursuant to Title 10, United States Code, Section 2304(a)(10) and Section 2304(a)(14)—is the final item relied upon by the prosecution bearing on the issue (trial minutes page 722).

The defendants' motion for a judgment of acquittal pursuant to Rule 29 (misstated or mistyped in the record as 28) was argued and denied by the Court below (trial minutes pages 734-739).

## ARGUMENT

### POINT I

**The evidence adduced as to whether or not the prime contracts were "negotiated" was insufficient to sustain a conviction.**

In any criminal prosecution it is axiomatic that the burden of proof rests with the prosecuting authority and that such burden must be met as to each and every individual "element" of the crime charged (*Davis v. United States*, 160 U.S. 469, 487; *Christoffel v. United States*, 338 U.S. 84, 89-90). Failure of proof as to any such element mandates acquittal.



The so-called "anti-kickback" statute (Title 41, Section 51, U.S.C.) began life as a civil remedy for the government, but was given penal application by addition of the criminal sanction through Section 54 (*U.S. v. Travers*, 361 F. 2d 753). It prohibits any payment or gratuity by any subcontractor to a prime contractor holding a negotiated contract with the United States. "Negotiated contract" is defined under Section 52 as one "made without formal advertising".

Although *knowledge* of the nature of the prime contract by one charged with making a payment or gratuity is *not* an element of the crime charged (*Hanis v. United States*, 246 F. 2d 781). The nature of the contracts must be proven to establish Federal jurisdiction (*Hanis, supra*, at page 786).

Thus for purposes of a motion for a verdict of acquittal or charging a jury, the nature of the prime contract becomes an "element" of a violation of Sections 51-54.

" . . . the essential elements of the crime defined by Section 54 are that the parties be within the class covered by the statute. . . . *a contract covered by the statute* . . . and an acceptance of a prohibited payment . . ." (emphasis supplied) (*Howard v. United States*, 354 F. 2d 126, 129).

While defining a "negotiated" contract as one "made without formal advertising", the statute in question does not define formal advertising, although the terms or procedures are defined at various places in the United States Code and Code of Federal Regulations (e.g., Title 10 U.S.C., Section 2305; 41 C.F.R., Section 1-2.101). At any rate it is quite clear from a reading of various statutes dealing with formal advertising that the so-called negotiated contract is intended to be the exception rather than the rule in the field of government procurement. This is particularly true of aircraft procurement wherein, it is

respectfully submitted the intent of Congress is to mandate competitive bidding through advertising for all prime design contracts (see Title 10 U.S.C., Chapter 135, Section 2271 *et seq.*).

The prosecution herein relied upon a stipulation as to the checked boxes on "item 13" of the prime contracts (indicating "negotiated" and one or another of two of the listed statutory exceptions to a requirement for formal advertising (Sections 2304(a)(10) and 2304(a)(14) of Title 10 U.S.C.), together with government exhibit 34 in evidence, to meet their burden of establishing that the prime contracts in question were "negotiated" within the meaning of the statute allegedly violated.

There was no testimony or stipulation as to who checked the boxes in question, nor, in the alternative, that such markings were made in the regular course of business with regard to those contracts or class of contracts. The Court below was properly troubled by the inherent limitation of the stipulation absent further evidence to demonstrate that the check marks so stipulated would establish "negotiated contracts" within the meaning of the statute (trial minutes pages 574 & 576-578).

Government exhibit 34 in evidence is merely a series of dated documents encaptioned "DETERMINATION AND FINDINGS" and purportedly authorizing negotiation in lieu of the formal advertising requirement for classes of contracts (in three instances) pursuant to 10 U.S.C. 2304(a)(10) and for "individual contracts" (in two instances) pursuant to 10 U.S.C. 2304(a)(14).

The "Determinations and Findings" relating to a "class of contracts" authorize negotiation of contracts for "change kits" for aircraft and proceed to list virtually every aircraft on duty with fleet. There is nothing other than the periods of effectiveness to relate these documents to the specific prime contracts in question. Interestingly

enough there was not offered in evidence any written certification required for implementation of these "class" determinations and findings by their final paragraphs.

The determinations and findings purporting to be for "individual contracts" do specify the source of procurement (Grumman) and number and type (A-6, E-2) of aircraft but once again there is no direct evidentiary link to the prime contracts in question.

In short it is respectfully submitted that quantum of proof relied upon by the prosecuting authority is wholly insufficient to establish that the prime contracts were "negotiated" within the meaning of the statute. The stipulation and the so-called "determinations and findings" cannot, absent further testimonial or documentary evidence, establish the required element, but at most can only elicit tenuous inferences.

### CONCLUSION

**The judgment of conviction should be reversed and the motion for verdicts of acquittal granted.**

Respectfully submitted,

SUTTER, MOFFATT, YANNELLI & ZEVIN, P.C.  
*Attorneys for Defendants-Appellants*



(57853)

UNITED STATES COURT OF APPEALS  
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

AFFIDAVIT  
OF SERVICE

STATE OF NEW YORK,  
COUNTY OF NEW YORK, ss.:

Juan Delgado, being duly sworn, deposes and says that he  
is over the age of 18 years, is not a party to the action, and resides  
at 596 Riverside Drive, New York, New York.  
That on April 2, 1975, he served 1 copies of Appendix  
and 2 copies of Brief of Appellants John R. Martin and Theil  
on Technical Services, Inc.

DAVID G. TRAGER,  
U. S. Attorney,  
Eastern District of New York,  
Attorney for Appellee,  
225 Cadman Plaza East  
Brooklyn, New York, 11201

by delivering to and leaving same with a proper person or persons in  
charge of the office or offices at the above address or addresses during  
the usual business hours of said day.

Sworn to before me this  
2nd day of April

, 19 75

*Juan Delgado*.....

*Charles J. Esposito*

CHARLES J. ESPOSITO  
Notary Public, State of New York  
No. 30-1132025  
Qualified in Nassau County  
Commission Expires March 30, 1977